

**MEETING OF THE
GREENSBORO BOARD OF ADJUSTMENT
JANUARY 26, 2015**

The regular meeting of the Greensboro Board of Adjustment was held on Monday, January 26, 2015 at 5:30 p.m. in the City Council Chamber of the Melvin Municipal Office Building. Board members present were: Vice Chair, Cyndy Hayworth, Patti Eckard, Frank Forde, Jeff Nimmer, Mark Cummings and Adam Marshall. Planning Department staff were: Loray Averett, Nicole Smith and Ron Fields, Code Enforcement Officer; and Jennifer Schnierer, City Attorney's Office.

Vice Chair Hayworth called the meeting to order and explained the policies and procedures of the Board of Adjustment. She further explained the manner in which the Board conducts its hearings and method of appealing any ruling made by the Board. The Vice Chair advised that each side, regardless of the number of speakers, would be allowed a total of 20 minutes to present evidence.

APPROVAL OF MINUTES

Ms. Eckard moved approval of the December minutes, as submitted, seconded by Mr. Forde. The Board voted unanimously in favor of the motion.

SWEARING IN OF STAFF

Loray Averett and Nicole Smith of the Planning Department and Ron Fields, Zoning Enforcement Officer were sworn or affirmed for their testimony during the proceedings.

CONTINUANCES/WITHDRAWALS

Vice Chair Hayworth asked if there were any continuances or withdrawals to be considered. Loray Averett stated that the applicant for BOA-14-38, 7806 Boeing Drive has withdrawn their item from the agenda. BOA Case-15-01, 2130 New Garden Road, Suite A, the applicants are present and may wish to ask for a continuance.

APPEAL OF NOTICE OF FIRST INCIDENT

- (a) BOA-14-38: **7806 BOEING DRIVE** Richard Greene, Attorney for JMB Golf and Travel, Inc. d.b.a. Treasure Club appeals the decision of a Notice of First Incident for a sexually oriented business which is regulated by the Entertainment Facility Use Ordinance. This case was continued from the December 15, 2014 meeting. Land Development Ordinance Section 30-8-13, Present Zoning-C-M (Commercial Medium), Cross Street-South Regional Road. **(WITHDRAWN)**

NEW BUSINESS

VARIANCE

- (a) BOA-15-01: **2130 NEW GARDEN ROAD, Suite A** Paul Jolin requests a variance from the minimum spacing requirement that a bar establishment located on a tract less than 5 acres must maintain from residentially zoned property. **Variance:** The proposed bar establishment will be zero feet from the nearest residentially zoned property, when no such establishment may be located within two hundred feet of residentially zoned property. Section 30-8-10.4(F), Present Zoning-CD-C-M (Conditional District-Commercial-Medium), Cross Street- Battleground Avenue. **(CONTINUED TO FEBRUARY MEETING)**

Loray Averett disclosed that she has had a conversation with the applicants about their right to continue the matter due to the number of Board members present.

Vice Chair Hayworth asked the representative to come forward to make a statement about their decision to either hear the case this evening or ask that it be continued.

Kevin Duhaime, 3823 Brandt Lake Court, stated that they would like to go ahead and proceed with the hearing tonight since there were six members present.

Speakers were sworn in for their testimony in this matter.

Loray Averett stated that the applicant requests a variance from the minimum spacing requirement that a bar establishment located on a tract less than 5 acres must maintain from residentially zoned property. The proposed bar establishment will be located on property that is zero feet from the nearest residentially zoned property, when no such establishment may be located within 200 feet of residentially zoned property; Thus the applicant is requesting a variance for zero separation from the residentially zoned property which is located south of the subject site. The property is located on the south side of New Garden Road - west of Battleground Avenue. It is zoned CD-C-M (Conditional District-Commercial-Medium). The zoning conditions do not prohibit the use of a bar on the property. The property functions as a shopping center with various retail and personal use services. The Guilford County tax record indicates the property consists of 2.45 acres. Tax records reflect the shopping center was constructed in 1998. The applicant is proposing to lease the most western unit of the building addressed as Suite A of the building. A bar that is located on tracts less than 5 acres is required to meet specific ordinance standards. The property containing the proposed bar use is required to be 200 feet from residentially zoned property. As the records reflect, there is a portion of residential property adjacent to this commercial property. The residential property is located south of the subject site. There is also a portion of Office zoning property south of the subject site as well. The spacing requirement is measured from the property line to the property line. The subject site has driveway accesses from New Garden Road. The parking spaces are located in front of and around the building on all sides. There are minimal parking spaces along the area that abuts the residential zoning. Only about five of the spaces will be within 30 feet of the residentially zoned property. If the variance is granted, the owner will have to comply with the additional standards concerning frontage, screening and parking as noted in the development standards. Exhibit 6 shows there are two residential tracts south of the subject site.

The nearest tract is addressed as 3521 Battleground Avenue, contains approximately 5.21 acres and is zoned R-3. The tract adjacent to this parcel is addressed as 2210 Tennyson Drive, contains approximately 5.0 acres and is also zoned R-3. Guilford County tax records reflect that both of these tracts are under the same ownership. Both properties have residential dwellings located on them. Staff's Exhibit #5 shows the parking layout on the site. On the subject site, there are approximately 2 parking spaces located north and 3 spaces located west of the residential zoning that will be within 30 feet of the residential zoning. Exhibit B contains information submitted from the applicant concerning his business plan for the subject site. The C-M, Commercial-Medium District: Primarily intended to accommodate a wide range of retail, service and office uses. The district is typically located along thoroughfares in areas which have developed with minimal front setbacks.

Vice Chair Hayworth asked for speakers in favor of the request to come forward and give their presentation.

Kevin DuHaime was sworn in and stated that the vacant property belongs to the person that is going to lease the area to them and is fully aware of the use of the property. He has spoken to the owner of the residential property to the rear and he is also aware of the intended use of the property and is not opposed to their plans. A notarized letter to this effect was submitted for review. Mr. Duhaime also submitted information concerning the residential property. The owner of that property does currently live on the property. The proposed use of the property is for a beer tasting facility with hours from 1:00 p.m. until about 10:00 p.m. and 11:00 p.m. on the weekends. There will only be beer and wine so no liquor or food will be served. Customers may bring in food from other facilities and visit the facility to taste the different beers that will be offered and possibly play games in the game room. There will also be a refrigerated area where customers may choose different kinds of beer to purchase. They hope that this will increase business to some of the other businesses in the area. This will be more of a relaxed atmosphere for people to come together for fellowship. A business plan for the proposed business was also submitted for review.

Paul Jolin, 8315 Morittsite Drive, Stokesdale, NC, the applicant, was sworn in and pointed out that customers can get a flight of several different kinds of beers and see which they like. There is also an area of 4-pack and 6-packs of the craft beer for carry-out purchase. This facility is similar to wine Styles located at Friendly Shopping Center where people can either purchase wine and go, or they can taste different kinds of wines. There also is music from time to time at the facility at Friendly.

For the proposed facility on New Garden Road, they hope to be able to offer that same type of atmosphere with an outside patio so that customers can enjoy the outdoors while tasting the different beers they offer. They do not plan to stay open until 2:00 a.m., as most bars do.

Mr. Nimmer asked if a membership would be required for people visiting the facility. Mr. DuHaime stated that no membership would be offered or required. Anyone could come into the business.

In response to questions by Mr. Cummings, the applicants stated that they looked at many different areas and this area, geographically, seems to be a great place for this type of business. There is good visibility and the building would not need a lot of demolition to refurbish it inside for their use. There will be some televisions and also some kind of audio system to play music. This facility will not be like a normal sports bar. The residential properties behind the proposed location are owned by one owner. This owner has speculated that in the future that residential property will become commercial property, but there is no time line on that now. That property owner has not asked for rezoning on this property

Loray Averett stated that the Planning staff has not received any rezoning request on the R-3 property. She stated that the pattern there would suggest that some day the R-3 is likely to change to something that is non-residential.

Counsel Schnierer stated that the most likely transition of this property from a residential perspective to non-residential would be initiated by the property owner. The City has no plans to initiate a rezoning of this area and, to her knowledge, there is not another party that would be interested in transitioning from residential to non-residential, at this point in time.

Ron Purdue, 5702 Country Lane, was sworn in and stated that in talking with the residential property owner, he is currently under contract with someone on the commercial side of looking at that property. Grant and Mark Robertson own the strip shopping center where the applicants plan to start their business which will be leased from them.

In response to Ms. Eckard who had questions about frontage, screening and parking issues. Mr. Purdue stated that they would take responsibility for that.

There being no speakers in opposition to the request, the public hearing was closed.

Discussion:

Mr. Marshall stated that he would support the request as he feels it is a good and well thought out plan, as well as the hours are so it will not be a problem for neighbors, and the fact that the resident that is there has blessed it. Mr. Forde stated that since the neighbors do not have a problem with it, he also has no problem with it. He does not feel that the property to the rear will be residential for very long. Ms. Eckard stated that she also feels that the residential property will change to non-residential in the future, so she would support the request. Mr. Nimmer stated that sometimes the ordinance definitions do not fit with a request and he feels this is not really going to be a bar, it will be more of a retail shop and he would support it. Mr. Cummings stated that he is opposed to the request because he is hard pressed to find how there is a hardship because the ordinance states, "complain resulting from the conditions that are peculiar to the property", and each of the existing properties there fit in the definition for this particular piece of property. He has asked what would it take for the owner of the residential area that is causing this requirement, to ask for a rezoning of the property. It seems to him that it would just take more time and more effort and probably more money to go that route, but he just does not see how this property or the hardship is something that is not germane to everything that is already there. Because of that, he will not vote to support the request. Ms. Hayworth stated that she would support the request and asked for a motion.

Mr. Forde moved that in regard to BOA-15-01, 2130 New Garden Road, that the findings of fact be incorporated, the Zoning Enforcement Officer be overruled, and the variance granted based on the following: there are practical difficulties or unnecessary hardships that result from carrying out the strict letter of the ordinance. If the applicant complies with the provisions of the ordinance, unnecessary hardship will result to the property by applying the strict application of the ordinance, because several legal allowable uses would be prohibited in the shopping center. The hardship of which the applicant complains results from conditions that are peculiar to the property and the unique circumstances related to the applicant's property because the large residentially zoned lot which adjoins the property has only one home, which home is located outside the separation requirement, but the lot line for that home is located within the separation requirement. The hardship results from the application of this ordinance to the property because the location of the aforementioned residentially zoned property is within the separation requirement, while the resident itself is outside the separation requirement. The hardship is not the result of the applicant's own actions because the residentially zoned property existed prior to the construction of the shopping center. The variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit because it allows for a legally allowable use to be realized in the shopping center with virtually no effect on the adjoining residentially zoned property. The granting of the variance assures the public safety and welfare and does substantial justice because it allows for the shopping center to be operated at its highest and best use with minimal or no effect on the surrounding residentially zoned property, seconded by Ms. Eckard. The Board voted 4-3 and the motion failed. (Ayes: Hayworth, Forde, Marshall, Eckard and Nimmer. Nays: (Cummings, Absent Member.)

In response to questions from Board members asking why the motion failed, Counsel Schnierer stated that this vote consisted of a negative vote for those members not in attendance. Loray Averett explained that there is a seven member Board and it must be four-fifths of the seven members. When a member is absent, unless disqualified, that member's vote also counts and falls to the negative.

Mr. Forde asked that this matter be re-opened as he did not realize that members not present at the hearing would be considered a negative vote. He asked that the matter be re-addressed so that Board members could have a re-vote on the issue and possibly continue the matter.

Mr. Forde stated that based on the fact that not all members are present, and he asked that the majority of the members who voted in favor of the request, re-vote now to re-open the vote, seconded by Ms. Eckard.

Mr. Cummings stated that he was confused and he wished to make sure he understands the process. He did not know that his negative vote was going to affect it like it did, but he still feels the same way. The applicant was given the opportunity to continue because of the number of Board members present and the applicant refused that opportunity. Ms. Eckard feels that there was confusion among the Board member, in general, and they may not have known that the absent members would have a negative vote on this matter.

Loray Averett stated that General Statute 160A-388 governs how the Board Members votes are calculated based on a 4/5 requirement of its members. She stated she had a conversation earlier today with the applicants about the number of members, the members that would be present and how the vote would be calculated. It is possible there wasn't enough clarity concerning the voting requirements.

Vice Chair Hayworth asked if there was a motion to re-open the public hearing.

Mr. Cummings had concerns about re-opening a public hearing after a vote was taken and stated that he would like to see that particular rule in the City Ordinance. Counsel Schnierer stated that it is legal and she would e-mail this information to Mr. Cummings.

Mr. Forde stated that he feels sure that if the applicant had been aware that the absent members would be voting in the negative, they would have certainly asked for the matter to be continued. He pointed out that the statute asks for a unanimous decision by all the Board members and that is a hurdle that no one should have to overcome.

Vice Chair Hayworth asked for a vote to re-open the public hearing. Mr. Forde moved to re-open the public hearing, seconded by Ms. Eckard. The Board voted 6-1 and the public hearing was re-opened. (Ayes: Hayworth, Forde, Marshall, Eckard, Cummings and Nimmer. Nays: (Absent Member.)

The public hearing was re-opened and Mr. Cummings stated that he feels the applicant have a fantastic idea and feels that part of the City will be well served by it. It just seems to him that the purpose of this Board is not to make it financially easy for a business to progress when there is no historical reason or something that is inherent in the property itself that disqualifies that particular idea from manifesting itself. If it were something where no business could be there, even if it was intended for business use, to him, that would seem appropriate, but where it is just saving time and money, because his questions were if the owner could apply to the City to rezone this property and the answer was, yes. That seems to be more appropriate, to him.

Mr. Forde stated that the applicant should not have to ask the property owner to rezone his property for his own convenience as that would be unfair to the property owner. He also feels the Board of Adjustment should be able to grant a variance, which would accomplish the same thing. He pointed out that the property that is currently residential certainly will not remain residential for very long and at some point the current application for a variance would not be necessary.

Kevin Dehaime stated that they have worked very hard to get this business on its feet. Under the circumstances and because they did not realize that there would be absent members with a negative vote, he would request a continuance to the February meeting.

Ms. Eckard moved that this matter be continued to the February meeting, seconded by Mr. Forde. The Board voted 5-2 in favor of the motion. (Ayes: Hayworth, Marshall, Forde, Eckard, Hayworth. Nays: Cummings and Absent Member.)

This matter will be heard at the February 23, 2015 meeting.

SPECIAL EXCEPTION

- (a) BOA-15-02: **920 WEST VANDALIA ROAD** Maria E. Bailey requests a Special Exception as authorized by Section 30-8-10.1(B) to allow a family care home separation encroachment from the current one-half mile development spacing standard. **Special Exception Request:** A proposed family care home will be 1,982 feet from one family care home (6 or less persons) to another family care home, (6 or less persons) located at 2006 Old Jones Road when 2,640 feet is required. Present Zoning-R-5 (Residential Single-family), Cross Street-Rehobeth Church Road. **(GRANTED)**

Nicole Smith stated that the applicant is proposing to locate a family care home which is too close to an existing family care home. It will be 1,982 feet from a family care home (6 or less persons) at 2006 Old Jones Road, when 2,640 feet is required. The lot is located on the north side of West Vandalia Road and is zoned R-5. The applicant is proposing to locate a family care home (6 or less persons) at this location and it is too close to an existing family care home located at 2006 Old Jones Road. The separation requirement is 2,640 feet. This proposed home will be 1,982 feet from the existing home at 2006 Old Jones Road. Privilege license records reflect the family care home at 2006 Old Jones Road is operational and required renewals are in compliance. The proposed family care home location is located south of the existing family care home. Exhibit 2 shows they are separated by a major thoroughfare (Business 85), various residential streets and neighborhoods. The R-5, Residential Single-family District is primarily intended to accommodate low density single family detached residential development. The overall gross density in R-5 will typically be 5.0 units per acre or less.

Maria E. Bailey, 2602 McConnell Road, was sworn in and stated that she owns a 6-bedroom home and all of her children are now grown and out on their own. She would like to offer her home as a family care home. She has already started taking classes to obtain her permits and licensing to enable her to open this family care facility. She took care of her mother and father until their passing in 2002 and 2005, so she is used to this kind of work. She has also adopted children and she has raised 11 children.

Eleanor Ward, 929 W. Vandalia Road, stated that she lives across the street and is not opposed to Ms. Bailey's plan for the family care home. She knows that she has several children of her own and is now lonely in the big house without them there. She feels this type of home would work very well in the neighborhood.

There being no one to speak in opposition to the request, the public hearing was closed.

Discussion:

Mr. Forde stated that the Board must find that a reduced separation will not promote the clustering of homes which could lead to resident persons to cloister themselves and not interact with other members of the community. He does not understand the rationale of this idea that those residents would cloister themselves and not interact with the community. He pointed out that the applicant's house is 1,800 feet from another group home and anyone would also have to cross business I-85 and he cannot imagine the residents of this home crossing that highway. He would support the request. Several of the decisions to be made are not up to the Board to decide, such as licensing, the type of residents, et cetera. He urged the other Board members to also support the request.

Mr. Forde moved that in BOA-15-02, 920 West Vandalia Road that the findings of fact be incorporated, the Zoning Enforcement Officer be overruled and the Special Exception granted based on the following: a Special Exception may be granted by the Board if evidence presented by the applicant persuades it to reach the following conclusions: the Special Exception is in harmony with the general purpose and intent of this ordinance and preserves its spirit because it allows the spirit of the ordinance to be complied with because the homes will not be clustered nor the residents to cloister themselves. The granting of the Special Exception assures the public safety and welfare and does substantial justice because it allows the applicant to use the property for the good of the community and preserves the spirit of the ordinance, seconded by Mr. Marshall. The Board voted 6-1 in favor of the motion. (Ayes: Hayworth, Marshall, Forde, Eckard, Nimmer and Cummings. Nays: Absent Member.)

APPEAL OF A NOTICE OF VIOLATION

- (a) BOA-15-03: **2602 MCCONNELL ROAD** Michael Crowe, Attorney At Law, on behalf of Kim Nguyen, owner of the Mini Market, appeals a Notice of Violation concerning the placement of barbed wire on fences located on this property. Section 30-9-4.5(D), Present zoning R-5 (Residential Single-family), Cross Street-South English Street. **(CONTINUED TO FEBRUARY MEETING)**

Michael Crowe, attorney representing the applicant, was sworn in and stated that he wished to continue this case based on the fact that he was unaware of the requirement of the number of Board members in regard to the voting. He pointed out that in Section 30-7.51 says, "An affirmative vote of four-fifths of the members present", so the initial hearing that came before the Board previously, more than eighty percent voted for that, so there is already some confusion with Legal and the Board on how these things are supposed to happen. There has also been confusion with him, as he did not know that he had to file the variance before he got here. He thought he only had to file for the hearing, so he would like the opportunity to file for the variance. Given that there is some confusion both the Legal, the Board and other applicants, he asked for a continuance to afford the opportunity for clarification of the rules. He feels that the key word in the statute is "members present".

Mr. Cummings asked Mr. Crowe to clarify his concerns. Mr. Crowe stated that he is concerned that without the seventh member being at the meeting, there will be some question as to whether or not the appeal of the violation is granted or not since there has already been some issues with that. Legal had stated that a previous case was not granted, even though Section 30-7.51 specifically states, "An affirmative vote of four-fifths of the members present" and the key terms are, "being present".

There are six people present and five out of six is more than four-fifths of the people at eighty percent, so obviously there is some confusion as to what it takes to get something set aside, so he would request a continuance to be heard when all seven members are present. He would like the opportunity to file a request for a variance in this matter.

Vice Chair Hayworth asked if the Board would vote for a continuance in this case. The Board members voted 6-1 in favor of the motion and the continuance was granted.

OTHER BUSINESS

ACKNOWLEDGEMENT OF ABSENCES

The absence of Ms. Huffman and Ms. Wood was acknowledged as excused.

ADJOURNMENT

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There being no further business before the Board, the meeting was adjourned at 7:10 p.m.

Respectfully submitted,

Cyndy Hayworth, Vice Chairman
Greensboro Board of Adjustment

CH/jd